



Billing Code 3110-01

OFFICE OF MANAGEMENT AND BUDGET

5 CFR Part 1303

RIN: 0348-AB42

OMB Freedom of Information Act Regulation

AGENCY: Office of Management and Budget, Executive Office of the President

ACTION: Proposed Rule; Notice of Proposed Rulemaking

SUMMARY: The Office of Management and Budget (OMB) seeks public comment on a proposed rule that would revise OMB's regulations found in our regulations implementing the Freedom of Information Act (FOIA). These revisions are being proposed to implement the FOIA and incorporate the provisions of the OPEN Government Act of 2007 and the FOIA Improvement Act of 2016 as well as to streamline OMB's FOIA regulations by structuring the text of the regulation in an order more similar to that of the Department of Justice's (DOJ) FOIA regulation and the DOJ Office of Information Policy's *Guidance for Agency FOIA Regulations*, thus promoting uniformity of FOIA regulations across agencies. Additionally, the regulations would be updated to reflect developments in the case law.

DATES: Comments are due on or before [INSERT DATE 30 Days AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

ADDRESSES: You may send comments, identified by docket number and/or RIN number, by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for sending comments.
- E-mail: OMBFOIA@omb.eop.gov. Include docket number and/or RIN number in the subject line of the message.
- Those who cannot submit electronically should contact the person identified in the FOR FURTHER INFORMATION CONTACT section by telephone for advice on filing alternatives.
- All comments received may be posted without change, including any personal information provided. Do not submit confidential business information, trade secret information, or other sensitive or protected information that you do not want to be available to the public.

FOR FURTHER INFORMATION CONTACT: Dionne Hardy, Office of Management and Budget, Office of General Counsel, at OMBFOIA@omb.eop.gov, 202-395-FOIA.

SUPPLEMENTARY INFORMATION:

Subjects: Freedom of Information, Administrative practice and procedure, Archives and records

Background

OMB proposes to revise its rules under the CFR at part 1303 governing requests and responses for agency records under the FOIA, 5 U.S.C. 552. These revisions are being proposed to implement the FOIA and incorporate the provisions of the OPEN Government Act of 2007 (Pub. L. 110–81) and the FOIA Improvement Act of 2016 (Pub. L. 114–185) as well as to streamline OMB’s FOIA regulations by structuring the text of the regulation in an order more similar to that of DOJ’s FOIA regulation and the DOJ Office of Information Policy’s *Guidance for Agency FOIA Regulations*, thus promoting uniformity of FOIA regulations across agencies. Additionally, the regulations would be updated to reflect developments in the case law. OMB proposes these changes after conducting the review made in accordance with section 3(a) of the FOIA Improvement Act of 2016, which provides that each agency “shall review the regulations of such agency and shall issue regulations on procedures for the disclosure of records under [the FOIA].”

Summary of Proposed Changes

For the reasons discussed in the preamble, OMB is proposing changes to the following rules in title 5 of the CFR to update its regulations consistent with OMB’s FOIA practices, the OPEN Government Act of 2007, and the FOIA Improvement Act of 2016. The proposed changes are summarized as follows:

- General revisions are proposed throughout Part 1303 to update terminology used and streamline language for clarity purposes and to restructure the text of the regulation into an order more similar to that of the DOJ’s FOIA regulation (28 CFR 16.10) and the DOJ OIP’s *Guidance for Agency FOIA Regulations*, thus promoting uniformity of FOIA regulations across agencies. For example, section 1303.10 currently includes information about required contents of FOIA requests, responsibilities of OMB to respond to requests, timing of responses, contents of responses, and appeals in a single code section. This proposal would separate those topics into their own code subsections and order them as listed in this paragraph, which follows the structure of DOJ’s FOIA regulation and OIP’s guidance. The remaining summarized changes to OMB’s existing regulation are listed according to their enumeration in the proposed regulatory text.
- Section 1303.3
 - Subsection (a) is updated to include changes to OMB offices since the last changes were made to this part.
- Section 1303.20
 - Current subsection 1303.10(b) is revised to update contact information and to provide the availability of, and services provided by, OMB’s FOIA Public Liaison.

- Section 1303.21
 - Added a new section regarding requests pertaining to individuals who authorize the release of information. The new text is modeled after the procedures described in DOJ's FOIA regulation.
- Section 1303.30
 - New subsection (a) is added to reflect OMB procedures for determining when it cuts off inclusion of records in a search and informs the requestor of such determination, pursuant to the rulings of *McGehee v. CIA*, 697 F.2d 1095 (D.C. Cir. 1983) and *Pub. Citizen v. Dep't of State*, 276 F.3d 634 (D.C. Cir. 2002).
 - New subsection (b) is added to reflect that documents for which control has been transferred to the National Archives pursuant to the Federal Records Act are not included in responses to requests to OMB. For example, all emails previously controlled by OMB which were created during the Obama Administration were transferred to the control of NARA in 2017 and therefore cannot be accessed by FOIA requests to OMB.
 - Subsection (c) describes OMB's procedures when it determines that another agency of the Federal Government is better able to determine whether a record is exempt from disclosure of the FOIA.
- Section 1303.40
 - New subsection (b) describes OMB's multitrack processing of FOIA requests. Requests will be placed into one of three tracks based on expedited processing and complexity of requests in terms of the amount of work or time involved in processing requests.
 - Proposed subsection (d), which is currently 1303.60 (c), is revised to provide for the aggregation of multiple requests from one requestor or a group of requestors acting in concert regarding clearly related matters, with a presumption that multiple such requests within a 45-day period will be aggregated. Setting a time period for this presumption for aggregation in cases of unusual circumstances will harmonize this provision with this regulation's aggregation provision concerning fees, section 1303.93 (c). This presumption period of 45 days is reasonable given that the total time that the FOIA allows an agency for routing (10 days), initial response (20 days), and response to an appeal (20 days) would be 50 days, and therefore the 45-day presumption period would support the apparent intent of the FOIA's aggregation provision to allow an agency to aggregate requests wherever they may be throughout the stages of the response process.
- Section 1303.50
 - New subsection (a) specifies that OMB will acknowledge requests and assign a tracking number to requests that will take longer than ten days to process, and will, upon request, make available an estimated date on which OMB will respond to the request.

- Subsection (b) is added to reflect OMB's practices regarding notification of grants of requests to requestors.
- Section 1303.60
 - This new section is modeled after DOJ's FOIA regulation and is added in order to follow the directive of Executive Order 12600. This section describes the procedures OMB will follow when records that are responsive to FOIA requests contain confidential commercial information. This subsection includes (1) definitions of the terms "confidential commercial information" and "submitter;" (2) specifications for when the procedures will be followed by OMB; and (3) an explanation of how a submitter has the opportunity to object to disclosure and the process followed by OMB to address those objections.
- Section 1303.70
 - Information on appeals of agency determinations currently in Section 1303.10 (e) is moved to a separate subsection, and revised to change the time period in which a requester can file an administrative appeal from 30 to 90 days, and is revised to specify that, in the case of an adverse determination, the requester can seek dispute resolution services from OMB's FOIA Public Liaison or the Office of Governmental Information Services (OGIS) of the National Archives and Records Administration (NARA), consistent with the FOIA Improvement Act of 2016.
- Section 1303.80
 - Added a new section describing OMB's responsibilities under the Federal Records Act (44 U.S.C. Chapter 31) and General Records Schedule 4.2.
- Section 1303.90
 - Revisions are made to the definitions currently in section 1303.30 to help clarify the meaning of each term.
 - Subsection (b) of section 1303.30 of the current regulation, regarding "[a] statute specifically providing for setting the level of fees for particular types of records," which would be a direct restatement of a statutory provision, is removed.
- Section 1303.91
 - Revisions are made in current sections 1303.30, 1303.40, and 1303.60 to help clarify OMB's procedures in assessing and charging fees and to update the terminology now used when describing electronic search and duplication processes.
 - Proposed subsection (a), currently section 1303.30 (c), is revised to remove a fee rate that is based the salary of the employee conducting the search and incorporates a flat rate of \$10.00 per quarter hour for professional work and \$4.75 per quarter hour for clerical or administrative work. This revision is made to assist requesters in anticipating the cost and assist OMB in determining those charges. Subsection (a) is also revised to distinguish between electronic searches and

searches that require the creation of software, as well as specify the fee schedule used when requested records are stored at the Federal Records Center operated by NARA.

- Proposed subsection (b), currently section 1303.40 (c) is revised to specify that fees will not be charged for costs incurred in resolving issues of law or policy.
- Subsection (c) is revised to change the rate charged for duplication from \$.15 per page to \$.05 per page. This subsection is also revised to remove the process by which OMB notifies requesters if the anticipated cost will exceed \$25, as that provision is moved to subsection (i).
- New subsection (h) is added to describe the limitations in charging fees when OMB does not comply with the FOIA's time limits in which to respond to a request. This subsection incorporates the language from section 2 of the FOIA Improvement Act of 2016.
- Subsection (i) is inserted to clarify that OMB will not charge a fee when the total fee, after deducting the 100 free pages (or its cost equivalent) and the first two hours of search, is equal to or less than \$25. Using language originally found in 1303.60(b), this subsection also clarifies that OMB will notify the requester that the estimated fee is higher than \$25, unless the requester has expressed a willingness to pay in advance.
- Section 1303.92
 - Revisions are made in this section, currently section 1303.50, to clarify the definition of the categories of requester and to avoid duplication with other provisions in these regulations.
- Section 1303.93
 - Section (c) of current section 1303.60 is revised to provide for the aggregation of multiple requests from one requestor or a group of requestors acting in concert regarding clearly related matters, with a presumption that multiple such requests within a 45-day period will be aggregated. The FOIA statute authorizes agencies to issue regulations for the aggregation of multiple requests in this way in order to prevent requesters from taking an unintended advantage of the FOIA statute's provision of the first two hours of search time or first 100 pages of duplication free of charge by breaking up a larger request into smaller requests. OMB believes that this presumption period of 45 days is reasonable given that the total time that the FOIA allows an agency for routing (10 days), initial response (20 days), and response to an appeal (20 days) would be 50 days, and therefore the 45-day presumption period would support the apparent intent of the FOIA's aggregation provision to allow an agency to group requests wherever they may be throughout the stages of the response process.
- Section 1303.94

- Subsections (b) and (c) are inserted into current section 1303.60 to provide additional detail regarding the factors OMB considers when assessing a request for a fee waiver, consistent with 5 U.S.C. 552(a)(4)(A)(i).

Classification

Regulatory Flexibility Act

OMB, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this regulation and, by proposing it, certifies that this regulation will not have a significant economic impact on a substantial number of small entities. Under the FOIA, agencies may recover only the direct costs of searching for, reviewing, and duplicating the records processed for requesters, and only for certain classes of requesters and when particular conditions are satisfied. Thus, fees assessed by the OMB are nominal.

Executive Orders 12866 and 13771

For purposes of Executive Order (EO) 13771 on *Reducing Regulation and Controlling Regulatory Costs*, this proposed rule is not an EO 13771 regulatory action because this rule is not a significant regulatory action under section 3(f) of EO 12866.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1995

This rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996 (as amended), 5 U.S.C. 804. This rule will not result in an annual effect on the economy of \$100,000,000 or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

COMMENTS REQUESTED

Interested persons are invited to provide written comments concerning the proposed rule. In particular, comments are requested regarding OMB's proposal to base the structure of this proposed rule revision on DOJ's current FOIA regulation and on the DOJ Office of Information Policy's *Guidance for Agency FOIA Regulations*. Comments are also requested regarding the ways in which this rule language departs from the language found in the DOJ's FOIA regulation in particular as well as other agency's FOIA regulations more generally. OMB requests comments on the proposed 45-day period for aggregating requests from the same requester, and in particular whether the period should be shorter or longer than 45 days and the proposal that a specific period of presumption is used in cases of unusual circumstances in addition to fees. Comments are due no later than 30 days after the date of publication of this notice in the Federal Register. All comments and suggestions received will be available for review on Regulations.gov or OMB's FOIA website: <https://www.whitehouse.gov/omb/freedom-information-act-foia/>.

List of Subjects in 5 CFR Part 1303

Office of Management and Budget, Freedom of Information Act, Administrative practice and procedure, Archives and records.

For the reasons stated in the preamble, OMB proposes to amend 5 CFR part 1303, as follows:

PART 1303--PUBLIC INFORMATION PROVISIONS OF THE ADMINISTRATIVE PROCEDURES ACT

1. The authority citation for part 1303 is revised to read as follows:

Authority: 5 U.S.C. 301 and 5 U.S.C. 552, unless otherwise noted.

2. Part 1303 is revised to read as follows:

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GENERAL

§ 1303.1 Purpose.

This part implements the Freedom of Information Act (FOIA), 5 U.S.C. 552, as amended, and prescribes the rules governing the public availability of Office of Management and Budget (OMB) records.

§ 1303.2 Authority and Functions.

The general functions of OMB, as provided by statute and by executive order, are to develop and to execute the budget, oversee implementation of Administration policies and programs, advise and assist the President, and develop and implement management policies for the government.

§ 1303.3 Organization.

(a) The central organization of OMB is as follows:

(1) The Director's Office includes the Director, the Deputy Director, the Deputy Director for Management, and the Executive Associate Director.

(2) Staff Offices include General Counsel, Legislative Affairs, Communications, Management and Operations, and Economic Policy.

(3) Offices that provide OMB-wide support include the Legislative Reference Division and the Budget Review Division.

(4) Resource Management Offices, which develop and support the President's management and budget agenda in the areas of Natural Resources, Energy and Science; National Security; Health; Education, Income Maintenance and Labor; and General Government Programs.

(5) Statutory offices include the Offices of Federal Financial Management, Federal Procurement Policy, Intellectual Property Enforcement Coordinator; E-government and Information Technology; and Information and Regulatory Affairs.

(b) OMB is located in the Old Executive Office Building, 17th Street and Pennsylvania Ave NW, and the New Executive Office Building, 725 17th Street NW, Washington, DC 20503. OMB has no field offices. Security in both buildings prevents visitors from entering the building without an appointment.

PROACTIVE DISCLOSURES

§ 1303.10 Availability of Proactive Disclosures.

OMB makes available records that are required by the FOIA to be made available for public inspection in an electronic format. OMB information pertaining to matters issued, adopted, or promulgated by OMB that is within the scope of 5 U.S.C. 552(a)(2) is available electronically on OMB's website at www.whitehouse.gov/omb/. Additionally, for help accessing these materials, you may contact OMB's FOIA Officer at (202) 395-3642.

REQUIREMENTS FOR MAKING REQUESTS

§ 1303.20 Where to Send Requests.

The FOIA Officer is responsible for acting on all initial requests. Individuals wishing to file a request under the FOIA should address their request in writing to FOIA Officer, Office of Management and Budget, 725 17th Street NW, Room 9204, Washington, DC 20503, via fax to (202) 395-3504, or by email at OMBFOIA@omb.eop.gov. Additionally, OMB's FOIA Public Liaison is available to assist requesters who have questions and can be reached at (202) 395-7545 or in writing at the address above.

§ 1303.21 Requesters Making Requests About Themselves or Others.

A requester who is making a request for records about himself or herself pursuant to 5 U.S.C. 552a must comply with the verification of identity requirements as determined by OMB pursuant to OMB's Rules For Determining if an Individual Is the Subject of a Record in 5 CFR 1302.1. Where a request for records pertains to another individual, a requester may receive greater access by submitting either a notarized authorization signed by that individual or a declaration made in compliance with the requirements set forth in 28 U.S.C. 1746 by that individual authorizing disclosure of the records to the requester, or by submitting proof that the individual is deceased (e.g., a copy of a death certificate or an obituary). As an exercise of administrative discretion, OMB may require a requester to supply additional information if necessary in order to verify that a particular individual has consented to disclosure.

§ 1303.22 Requirement for Providing Description of the Records Sought.

Requesters must describe the records sought in sufficient detail to enable OMB personnel to locate them with a reasonable amount of effort. To the extent possible, requesters should include specific information that may help the agency identify the requested records, such as the date, title or name, author, recipient, subject matter of the record, case number, file designation, or reference number. Before submitting their requests, requesters may contact the FOIA Officer or FOIA Public Liaison to discuss the records they seek and to receive assistance in describing the records.

If, after receiving a request, OMB determines that the request does not reasonably describe the records sought, OMB will inform the requester what additional information is needed and why the request is otherwise insufficient. Requesters who are attempting to reformulate or modify such a request may discuss their request with the FOIA Officer or the FOIA Public Liaison. If a request does not reasonably describe the records sought, OMB's response to the request may be delayed.

RESPONSIBILITY FOR RESPONDING TO REQUESTS

§ 1303.30 Responsibility for Responding to Requests.

(a) Search cutoff date. In determining which records are responsive to a request, OMB ordinarily will include only records in its possession as of the date that it begins its search. If any other date is used, OMB will inform the requester of that date.

(b) Transfer of Records to the National Archives and Records Administration (NARA). Permanent records of OMB which have been transferred to the control of NARA under the Federal Records Act are not in the control of OMB and are therefore not accessible by a FOIA request to OMB. Requests for such records should be directed to NARA.

(c) Consultation and referral. When reviewing records, OMB will determine whether another agency of the Federal Government is better able to determine whether the record is exempt from disclosure under the FOIA. As to any such record, OMB will proceed in one of the following ways:

(1) Consultation. When records contain information of interest to another agency, OMB typically will consult with that agency prior to making a release determination.

(2) Referral.

(i) When OMB believes that a different agency is best able to determine whether to disclose the record, OMB will refer the responsibility for responding to the request regarding that record to that agency. Ordinarily, the agency that originated the record is best situated to make the disclosure determination. However, if OMB and the originating agency jointly agree that OMB is in the best position to respond regarding the record, then OMB may provide it.

(ii) If OMB determines that another agency is best situated to consider a request, OMB promptly will notify the requestor and inform him of the agency which will be processing his request, except when disclosure of the identity of the agency could harm an interest protected by an applicable FOIA exemption. In those instances, in order to avoid harm to an interest protected by an applicable exemption, OMB will coordinate with the originating agency to seek its views on the disclosability of the record and convey the release determination for the record that is the subject of the coordination to the requester.

TIMING OF RESPONSES TO REQUESTS

§ 1303.40 Timing of Responses to Requests.

(a) Upon receipt of any request for information or records, the FOIA Officer will determine within 20 working days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such request whether it is appropriate to grant the request and will immediately notify the requester of (1) such determination and the reasons therefore and (2) the right of such person to seek assistance from the FOIA Public Liaison. The 20-day period, as used herein, shall commence on the date on which the FOIA Officer or the FOIA Public Liaison first receives the request. OMB may toll this 20-day period either (1) one time while OMB is awaiting information that it has reasonably requested from the requester or (2) any time when necessary

to clarify with the requester issues regarding fee assessment. OMB's receipt of the requester's response to OMB's request for information ends the tolling period.

(b) Multitrack processing. FOIA requests are placed on one of three tracks:

- (1) Track one covers those requests that seek and receive expedited processing pursuant to subsection (a)(6)(E) of the FOIA and in accordance with subsection (g) below.
- (2) Track two covers simple requests
- (3) Track three covers complex requests.

Whether a request is simple or complex is based on the amount of work or time needed to process the request. OMB considers various factors, including the number of records requested, the number of pages involved in processing the request, and the need for consultations or referrals. OMB will advise the requester of the processing track in which their request has been placed and provide an opportunity to narrow or modify their request so that the request can be placed in a different processing track.

(c) Unusual circumstances. Whenever the statutory time limit for processing a request cannot be met because of "unusual circumstances," as defined in the FOIA, and OMB extends the time limit on that basis, OMB will, before expiration of the 20-day period to respond, notify the requester in writing of the unusual circumstances involved and of the date by which processing of the request can be expected to be completed. Where the extension exceeds 10 working days, OMB will, as described by the FOIA, provide the requester with an opportunity to modify the request or arrange an alternative time period for processing. OMB will alert requesters to the availability of its FOIA Public Liaison, who will assist in the resolution of any disputes between the requester and OMB, and notify the requester of the right of the requester to seek dispute resolution services from the Office of Government Information Services (OGIS).

(d) Aggregating Requests. When OMB reasonably believes that a requester, or a group of requestors acting in concert, has submitted requests that constitute a single request, that would otherwise satisfy the unusual circumstances specified in this section, OMB may aggregate those requests for the purposes of this section. OMB will presume that multiple requests of this type made within a 45-day period can be aggregated for the purposes of this section. For requests separated by a longer period, OMB will aggregate them only where there is a reasonable basis for determining that aggregation is warranted in view of all the circumstances involved. Multiple requests involving unrelated matters will not be aggregated.

(e) Expedited processing.

(1) Requests and appeals will be given expedited treatment in cases where OMB determines:

- (i) the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual;
- (ii) there is an urgency to inform the public about an actual or alleged Federal

Government activity;

(iii) failure to respond to the request expeditiously would result in the loss of due process rights in other proceedings; or

(iv) there are possible questions, in a matter of widespread and exceptional public interest, about the government's integrity which effect public confidence.

(2) A request for expedited processing may be made at the time of the initial request for records or at any later time.

(3) A requester who seeks expedited processing must submit a statement, certified to be true and correct to the best of the requester's knowledge and belief, explaining in detail the basis for requesting expedited processing. OMB may waive this certification requirement at its discretion.

(4) OMB will decide whether to grant expedited processing and will notify the requester within 10 days after the date of the request. If a request for expedited treatment is granted, OMB will prioritize the request and process the request as soon as practicable. If a request for expedited processing is denied, any appeal of that decision will be acted on expeditiously.

RESPONSES TO REQUESTS

§ 1303.50 Responses to requests.

(a) *Acknowledgements of requests.* OMB will assign an individualized tracking number to each request received that will take longer than ten days to process; and acknowledge each request, informing the requestor of their tracking number if applicable; and, upon request, make available information about the status of a request to the requester using the assigned tracking number, including —

(i) the date on which OMB originally received the request; and

(ii) an estimated date on which OMB will complete action on the request.

(b) *Grants of requests.* Once OMB makes a determination to grant a request in full or in part, it will notify the requester in writing. OMB also will inform the requester of any fees charged under Sec. 1303.9 and shall provide the requested records to the requester promptly upon payment of any applicable fees. OMB will inform the requester of the availability of the FOIA Public Liaison to offer assistance.

(c) *Adverse determinations of requests.* In the case of an adverse determination, the FOIA Officer will immediately notify the requester of —

(i) the right of the requester to appeal to the head of OMB within 90 calendar days after the date of such adverse determination in accordance with Sec. 1303.70;

- (ii) the right of such person to seek dispute resolution services from the FOIA Public Liaison or the OGIS at NARA;
- (iii) the names and titles or positions of each person responsible for the denial of such request; and
- (iv) OMB's estimate of the volume of any requested records OMB is withholding, unless providing such estimate would harm an interested protected by the exemption in 5 U.S.C. 552(b).

CONFIDENTIAL COMMERCIAL INFORMATION

§ 1303.60 Confidential Commercial Information.

Notification Procedures for Confidential Commercial Information.

(a) Definitions.

(1) "Confidential commercial information" means commercial or financial information obtained by OMB from a submitter that may be protected from disclosure under Exemption 4 of the FOIA, 5 U.S.C. 552(b)(4).

(2) "Submitter" means any person or entity, including a corporation, State, or foreign government, but not including another Federal Government entity, that provides confidential commercial information, either directly or indirectly to the Federal Government.

(b) Designation of confidential commercial information. A submitter of confidential commercial information must use good faith efforts to designate by appropriate markings, at the time of submission, any portion of its submission that it considers to be protected from disclosure under Exemption 4 of the FOIA. These designations expire 10 years after the date of the submission unless the submitter requests and provides justification for a longer designation period.

(c) When notice to submitters is required. OMB will promptly notify a submitter when OMB determines that a pending FOIA lawsuit seeks to compel the disclosure of records containing the submitter's confidential information, or if OMB determines that it may be required to disclose such records, provided:

(1) The requested information has been designated by the submitter as information considered protected from disclosure under Exemption 4 in accordance with subsection (b); or

(2) OMB has a reason to believe that the requested information may be protected from disclosure under Exemption 4, but has not yet determined whether the information is protected from disclosure.

The notice will describe the commercial information requested or include a copy of the requested records or portions of records containing the information. In cases involving a voluminous number of submitters, OMB may post or publish a notice in a place or manner reasonably likely to inform the submitters of the proposed disclosure, instead of sending individual notifications.

(d) Exceptions to submitter notice requirements. The notice requirements of this section do not apply if:

- (i) OMB determines that the information is exempt under the FOIA, and therefore will not be disclosed;

- (ii) The information has been lawfully published or has been officially made available to the public;

- (iii) Disclosure of the information is required by law, including regulation issued in accordance with the requirements of Executive Order 12,600 of June 23, 1987; or

- (iv) The designation made by the submitter under paragraph (2) of this section appears obviously frivolous. In such case, OMB will give the submitter written notice of any final decision to disclose the information within a reasonable number of days prior to a specified disclosure date.

(e) Opportunity to object to disclosure.

- (i) Unless OMB specifies a different period, submitters who fail to respond to OMB's notice within 30 days of OMB's notice will be deemed to have consented to disclosure.

- (ii) If a submitter has any objections to disclosure, it should provide OMB a detailed written statement that specifies all grounds for withholding the particular information under any exemption of the FOIA. In order to rely on Exemption 4 as basis for nondisclosure, the submitter must explain why the information constitutes a trade secret or commercial or financial information that is confidential. OMB is not required to consider any information received after the date of any disclosure decision.

- (iii) Any information provided by a submitter under this section may itself be subject to disclosure under the FOIA.

(f) Analysis of objections. OMB will consider a submitter's objections and specific grounds for nondisclosure in deciding whether to disclose the requested information.

(g) Notice of intent to disclose. Whenever OMB decides to disclose information over the objection of a submitter, OMB will provide the submitter written notice, which will include:

(i) A statement of the reasons why each of the submitter's disclosure objections were not sustained;

(ii) A description of the information to be disclosed or copies of the records as OMB intends to release them; and

(iii) A specified disclosure date, at least 30 days after OMB transmits its notice of intent to disclose, except for good cause.

(h) Requester notification. OMB will notify the requester whenever it provides the submitter with notice and an opportunity to object to disclosure; whenever it notifies the submitter of its intent to disclose the requested information; and whenever a submitter files a lawsuit to prevent the disclosure of the information.

APPEALS

§ 1303.70 Appeals.

A requester must appeal to the head of OMB in writing within 90 calendar days after the date of such adverse determination addressed to the FOIA Officer at the address specified in Sec.

1303.20. The appeal must include a statement explaining the basis for the appeal.

Determinations of appeals will be set forth in writing and signed by the Deputy Director, or his designee, within 20 working days. If on appeal the denial is upheld in whole or in part, the written determination will also contain a notification of the provisions for judicial review, the names of the persons who participated in the determination, and notice of the services offered by the OGIS as a non-exclusive alternative to litigation.

OGIS's dispute resolution services is a voluntary process. If OMB agrees to participate in the mediation services provided by OGIS, OMB will actively engage as a partner to the process in an attempt to resolve the dispute. An appeal ordinarily will not be adjudicated if the request becomes a matter of FOIA litigation. Before seeking review by a court of an agency's adverse determination, a requester generally must first submit a timely administrative appeal.

PRESERVATION OF RECORDS

§ 1303.80 Preservation of Records.

OMB will preserve all correspondence pertaining to the requests that it receives under this section, as well as copies of all requested records, until disposition or destruction is authorized pursuant to title 44 of the United States Code or NARA's General Records Schedule 14. OMB will not dispose of or destroy records while they are the subject of a pending request, appeal, or lawsuit under the FOIA.

Fees

§ 1303.90 Definitions.

For the purpose of these regulations:

- (a) All definitions set forth in the FOIA apply.
- (b) The term “direct costs” means those expenditures that OMB actually incurs in searching for and duplicating (and in the case of commercial requesters, reviewing) documents to respond to a FOIA request. Not included in direct costs are overhead expenses such as costs of space, heating, or lighting the facility in which the records are stored.
- (c) The term “search” means the process of looking for and retrieving records or information responsive to a request. It includes page-by-page or line-by-line identification of information within records and also includes reasonable efforts to locate and retrieve information from records maintained in electronic form or format.
- (d) The term “duplication” means the making of a copy of a document, or of the information contained in it, that is necessary to respond to a FOIA request. Such copies can be in the form of paper, microform, audio-visual materials, or electronic records (e.g., magnetic tape or disk), among others.
- (e) The term “review” refers to the process of examining documents located in response to a request to determine whether any portion of any document located is permitted to be withheld. It also refers to the processing of any documents for disclosure, e.g., doing all that is necessary to excise them and otherwise prepare them for release. Review does not include time spent resolving general legal or policy issues regarding the application of exemptions.
- (f) The term “commercial use request” is a request that asks for information for a use or purpose that furthers a commercial, trade, or profit interest, which can include furthering those interests through litigation. .
- (g) The term “educational institution” is any school that operates a program of teaching or scholarly research. To be eligible for inclusion in this category, requesters must show that the request is being made as authorized by and in connection with the requester’s role at a qualifying institution and that the records are not sought for commercial use, but are sought in furtherance of teaching or scholarly research. OMB may seek assurance from the requester that the request is in furtherance of teaching or scholarly research and will advise requesters of their placement in this category.
- (h) The term “non-commercial scientific institution” refers to an institution that is not operated on a commercial basis (as that term is referenced in paragraph (g) of this section) and that is operated solely for the purpose of conducting scientific research where the results of the research are not intended to promote any particular product or industry. A requester in this category must show that the request is authorized by and is made under the auspices of a qualifying institution and that the records are sought to further scientific research and are not for a commercial use.

(i) The term “representative of the news media” refers to any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.

(j) The term “news” means information that is about current events or that would be of current interest to the public. Examples of news-media entities include television or radio stations broadcasting to the public at large, and publishers of periodicals (but only in those instances when they can qualify as disseminators of “news”) who make their products available for purchase, subscription, or free distribution to the general public. These examples are not all-inclusive. Moreover, as methods of news delivery evolve, such alternative media would also be included in this category. Freelance journalists may be regarded as working for a news-media organization if the journalist can demonstrate a solid basis for expecting publication through that organization, even though the journalist is not actually employed by the organization. A publication contract would present solid basis for such an expectation, but OMB may also look to the past publication record of a requester in making such a determination.

§ 1303.91 Fees to be Charged – General.

OMB will charge fees that recoup the full allowable direct costs it incurs. Moreover, it will use the most efficient and least costly methods to comply with requests for documents made under the FOIA. For example, employees should not engage in line-by-line search when merely duplicating an entire document would prove the less expensive and quicker method of complying with a request. Search should be distinguished, moreover, from review of material in order to determine whether the material is exempt from disclosure. When documents that would be responsive to a request are maintained for distribution by agencies operating statutory-based fee schedule programs (see definition in Section 1303.30(b)), such as the NTIS, OMB will inform requesters of the steps necessary to obtain records from those sources.

(a) Search. Requests made by educational institutions, noncommercial scientific institutions, or representatives of the news media are not subject to search fees. OMB will charge search fees for all other requesters, subject to the restrictions of paragraph (h) of this section.

(1) For each quarter hour spent by personnel searching for requested records, including electronic searches that do not require new programming, the fees will be charged as follows: professional — \$10.00; and clerical/administrative — \$4.75.

(2) Requesters shall be charged the direct costs associated with conducting any search that requires the creation of a new computer program to locate the requested records. Requesters shall be notified of the costs associated with creating such a program and must agree to pay the associated costs before the costs may be incurred.

(b) Review of records. Only requesters who are seeking documents for commercial use may be charged for time spent reviewing records to determine whether they are exempt from mandatory disclosure. Charges may be assessed only for the initial review; i.e., Records or portions of records withheld in full under an exemption that is subsequently determined not to apply may be reviewed again to determine the applicability of other exemptions not previously considered. The costs for such a subsequent review is assessable. However, review costs will not include

any costs incurred in resolving issues of law or policy that may be raised in the course of processing a request under this section.

(c) Duplication of records. The requester's specified preference of form or format of disclosure will be honored if the record is readily reproducible in that format. Where photocopies are supplied, OMB will provide one copy per request at a cost of five cents per page. For copies prepared by computer, such as tapes or printouts, OMB will charge the actual cost, including operator time, of production of the tape or printout. For other methods of reproduction or duplication, OMB will charge the actual direct costs of producing the document(s).

(d) *Other charges.* OMB will recover the full costs of providing services such as those enumerated below when it elects to provide them:

(1) Certifying that records are true copies; or

(2) Sending records by special methods, such as express mail.

(e) Remittances shall be in the form of either a personal check, a bank draft drawn on a bank in the United States, or a postal money order. Remittances shall be made payable to the order of the Treasury of the United States and mailed to the FOIA Officer at the address found in Section 1303.10(b) above.

(f) A receipt for fees paid will be provided upon request. Refund of fees paid for services actually rendered will not be made.

(g) Restrictions on assessing fees. With the exception of requesters seeking documents for a commercial use, OMB will provide the first 100 pages of duplication (or the cost equivalent for other media) and the first two hours of search time without charge.

(h) If OMB fails to comply with the FOIA's time limits in which to respond to a request, it may not charge search fees, or, in the instances of requests from requesters described in section 1303.90(g) through (i), may not charge duplication fees, except as described in the following circumstances:

(1) If OMB has determined that unusual circumstances, as defined by the FOIA, apply, and OMB provided timely written notice to the requester in accordance with the FOIA, a failure to comply with the time limit will be excused for an additional 10 days.

(2) If OMB has determined that unusual circumstances, as defined by the FOIA, apply, and more than 5,000 pages are necessary to respond to the request, OMB may charge search fees, or, in the case of requesters described in Section 1303.90(g) through (i), may charge duplication fees, if OMB has provided timely written notice to the requester in accordance with the FOIA and OMB has discussed with the requester via written mail, e-mail, or telephone (or made not less than three good-faith attempts to do so) how the requester could effectively limit the scope of the request in accordance with 5 U.S.C. 552(a)(6)(B)(ii).

(3) If a court determines that exceptional circumstances exist, as defined by the FOIA, a failure to comply with the time limits shall be excused for the length of time provided by the court order.

(i) No fee will be charged when the total fee, after deducting the 100 free pages (or its cost equivalent) and the first two hours of search, is equal to or less than \$25. If OMB estimates that the charges are likely to exceed \$25, it will notify the requester of the estimated amount of fees, unless the requester has indicated in advance his willingness to pay fees as high as those anticipated. Such a notice shall offer a requester the opportunity to confer with agency personnel to meet the requester's needs at a lower cost.

§ 1303.92 Fees to be Charged – Categories of Requesters.

There are four categories of FOIA requesters: commercial use requesters; educational and non-commercial scientific institutions; representatives of the news media; and all other requesters. The specific levels of fees for each of these categories are:

(a) Commercial use requesters. When OMB receives a request for documents for commercial use, it will assess charges that recover the full direct costs of searching for, reviewing for release, and duplicating the record sought. Commercial use requesters are not entitled to two hours of free search time nor 100 free pages of reproduction of documents. OMB may recover the cost of searching for and reviewing records even if there is ultimately no disclosure of records (see Sec. 1303.93(b)).

(b) Educational and non-commercial scientific institution requesters. OMB will provide documents to requesters in this category for the cost of reproduction alone, excluding charges for the first 100 pages. To be eligible for inclusion in this category, a requester must meet the criteria in Sec. 1303.30(h) through (i). OMB may seek evidence from the requester that the request is in furtherance of scholarly research and will advise requesters of their placement in this category.

(c) Requesters who are representatives of the news media. OMB will provide documents to requesters in this category for the cost of reproduction alone, excluding charges for the first 100 pages. To be eligible for inclusion in this category, a requester must meet the criteria in § 1303.10(j) through (k) and not make the request for commercial use. A request for records supporting the news dissemination function of the requester is not a commercial use for this category.

(d) All other requesters. OMB will charge requesters who do not fit into any of the categories above fees that recover the full reasonable direct cost of searching for and reproducing records that are responsive to the request, except that the first 100 pages of reproduction and the first two hours of search time will be furnished without charge. Moreover, requests for records about the requesters filed in OMB's systems of records will continue to be treated under the fee provisions of the Privacy Act of 1974, which permit fees only for reproduction.

§ 1303.93 Miscellaneous Fee Provisions.

(a) Charging interest – notice and rate. OMB may begin assessing interest charges on an unpaid bill starting on the 31st day after OMB sends the bill. If OMB receives the fee within the thirty-day grace period, interest will not accrue on the paid portion of the bill, even if the payment is unprocessed. Interest will be at the rate prescribed in section 3717 of title 31 of the United States Code and will accrue from the date of the billing.

(b) Charges for unsuccessful search. OMB may properly charge for time spent searching even if it does not locate any responsive records or if OMB determines that the records are entirely exempt from disclosure.

(c) Aggregating requests. A requester may not file multiple requests at the same time, each seeking portions of a document or documents, solely in order to avoid payment of fees. When OMB reasonably believes that a requester, or a group of requestors acting in concert, has submitted requests that constitute a single request, involving clearly related matters, OMB may aggregate those requests and charge fees accordingly. OMB will presume that multiple requests of this type made within a 45-day period have been made in order to avoid fees. For requests separated by a longer period, OMB will aggregate them only where there is a reasonable basis for determining that aggregation is warranted in view of all the circumstances involved. Multiple requests involving unrelated matters shall not be aggregated.

(d) Advance payments.

- (1) OMB will not require a requester to make an advance payment, i.e., payment before work is commenced or continued on a request, unless OMB estimates or determines that allowable charges that a requester may be required to pay are likely to exceed \$250 or the requester has previously failed to make payments due within 30 days of billing.
- (2) In cases in which OMB requires advance payment, the request will not be considered received and further work will not be completed until the required payment is received. If the requester does not pay the advance payment within 30 calendar days after the date of OMB's fee determination, the request will be closed.

(e) Effect of the Debt Collection Act of 1982 (Pub. L. 97-365). OMB will comply with applicable provisions of the Debt Collection Act, including disclosure to consumer reporting agencies and use of collection agencies, where appropriate, to encourage repayment.

§ 1303.94 Waiver or Reduction of Charges.

(a) How to apply for a fee waiver. Requesters may seek a waiver of fees by submitting a written application demonstrating how disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

(b) Factors for approving fee waivers. OMB will furnish records responsive to a request without charge or at a reduced rate when it determines, based on all available information, that the following factors are satisfied:

(i) Disclosure of the requested information would shed light on the operations or activities of the government. The subject of the request must concern identifiable operations or activities of the Federal Government with a connection that is direct and clear, not remote or attenuated.

(ii) Disclosure of the requested information is likely to contribute significantly to public understanding of those operations or activities. This factor is satisfied when both of the following criteria are met:

(A) Disclosure of the requested records must be meaningfully informative about government operations or activities. The disclosure of information that already is in the public domain, in either the same or a substantially identical form, would not be meaningfully informative if nothing new would be added to the public's understanding.

(B) The disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester. A requester's expertise in the subject area as well as the requester's ability and intention to effectively convey information to the public must be considered. OMB will presume that a representative of the news media will satisfy this consideration.

(iii) The disclosure must not be primarily in the commercial interest of the requester. To determine whether disclosure of the requested information is primarily in the commercial interest of the requester, OMB will consider the following criteria:

(A) OMB will identify whether the requester has any commercial interest that would be furthered by the requested disclosure. A commercial interest includes any commercial, trade, or profit interest. Requesters must be given an opportunity to provide explanatory information regarding this consideration.

(B) If there is an identified commercial interest, OMB must determine whether that is the primary interest furthered by the request. A waiver or reduction of fees is justified when the requirements of paragraphs (b)(i) and (ii) are satisfied and any commercial interest is not the primary interest furthered by the request. OMB ordinarily will presume that when a news media requester has satisfied factors (i) and (ii) above, the request is not primarily in the commercial interest of the requester. Disclosure to data brokers or others who merely compile and market government information for direct economic return will not be presumed to primarily serve the public interest.

(c) Timing of requests for fee waivers. Requests for a waiver or reduction of fees should be made when the request is first submitted to OMB and should address the criteria referenced above. A requester may submit a fee waiver request at a later time so long as the underlying record request is pending or on administrative appeal. When a requester who has committed to

pay fees subsequently asks for a waiver of those fees and that waiver is denied, the requester shall be required to pay any costs incurred up to the date the fee waiver request was received.

Dated: August 17, 2018.

Mark R. Paoletta,

General Counsel and Chief FOIA Officer

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